PD-0478-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/20/2019 4:03 PM
Accepted 11/21/2019 10:16 AM
DEANA WILLIAMSON
CLERK

No. PD-0478-19

IN THE COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
11/21/2019
DEANA WILLIAMSON, CLERK

OF THE STATE OF TEXAS

**Ex parte Leonardo Nuncio, Appellant**

Appeal from Webb County

* * * * *

# STATE'S BRIEF ON THE MERITS

* * * * *

Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

John R. Messinger
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

## TABLE OF CONTENTS


INDEX OF AUTHORITIES.. . . . . ii

STATEMENT REGARDING ORAL ARGUMENT. . . . . 1

ISSUE PRESENTED.. . . . . 1

STATEMENT OF FACTS. . . . . 2

SUMMARY OF THE ARGUMENT. . . . . 3

ARGUMENT.. . . . . 3

I. The only issue in this case is vagueness.. . . . . 3

A. Three distinct doctrines.. . . . . 3
1. Scrutiny analysis. . . . . 4
2. The overbreadth doctrine. . . . . 5
3. Vagueness.. . . . . 6

B. There is no true overbreadth claim before this Court.. . . . . 8
1. Appellant never made one in any court.. . . . . 8
2. Appellant did not ask for review of one.. . . . . 9
3. Appellant isn't making one now.. . . . . 10

C. This Court shouldn't address an unpreserved, undecided, and ungranted issue.. . . . . 11

II. Vagueness law.. . . . . 12

A. Perfection is not required.. . . . . 12
B. But the statute must have a "core.". . . . . 14
C. The presence of a "core" determines who can complain about what.. . . . . 15
D. This is a good idea, but not a new one.. . . . . 20

III. Appellant's vagueness claim fails because he makes no as-applied challenge and committed a "core" violation.. . . . . 22

A. Appellant does not claim *he* had no notice.. . . . . 22

B. Appellant's conduct fits squarely within the "core" prohibited conduct... 23

IV. There are no First Amendment considerations in this case... 24

A. Intentional harassment is not communication... 25
1. This Court said so in *Scott*.. 25
2. There is a difference between unprotected speech and non-speech... 27
B. The statute restricts only intentional harassment that is unprotected obscenity.. 28
C. Incidental restriction of legitimate, non-obscene communication does not change the calculus.. 30
1. This Court has not abandoned *Scott*.. 30
2. Legitimate communication can be done without being intentionally harassing and obscene.. 32
a. Some time, place, and manner restrictions are acceptable.. 32
b. "Dual intent" communicators can find another way.. 34

V. The statute gives full and fair notice to citizens and law enforcement.. 35
A. A quick note on substance versus notice.. 35
B. "Harass" is dictated by the defendant's intent.. 36
C. That intent is qualified by an objective standard.. 37
D. "Another" means another person.. 40
E. "Ultimate sex act" is clear even without helpful examples.. 40

VI. Conclusion. 42

PRAYER FOR RELIEF. 43

CERTIFICATE OF COMPLIANCE.. 44

CERTIFICATE OF SERVICE. 44

## INDEX OF AUTHORITIES

**Cases**

*Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997). . . . . 4

*Andrews v. State*, 652 S.W.2d 370 (Tex. Crim. App. 1983). . . . . 29

*People v. Austin*, __ N.E.3d __, 2019 WL 5287962 (October 18, 2019). . . . . 35

*Ex parte Barton*, __ S.W.3d __, 2019 WL 4866036 (Tex. App.—Fort Worth 2019, pet. filed) (on reh'g). . . . . 31

*Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142 (Tex. App.—Austin June 2, 2016, pet. ref'd). . . . . 31

*Broadrick v. Oklahoma*, 413 U.S. 601 (1973). . . . . 6

*Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011). . . . . 4

*Bryant v. State*, No. 05-91-00946-CR, 1992 WL 355555 (Tex. App.—Dallas Dec. 4, 1992, no pet.). . . . . 42

*Coates v. City of Cincinnati*, 402 U.S. 611 (1971). . . . . 14-15

*Connally v. Gen. Const. Co.*, 269 U.S. 385 (1926). . . . . 12

*Constantino v. State*, 255 S.E.2d 710 (Ga. 1979). . . . . 36

*Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). . . . . 7, 18

*Dombrowski v. Pfister*, 380 U.S. 479 (1965). . . . . 20-21

*Dowden v. State*, 758 S.W.2d 264 (Tex. Crim. App. 1988). . . . . 40

*State v. Doyal*, __ S.W.3d __, No. PD-0254-18, 2019 WL 944022 (Tex. Crim. App. 2019). . . . . *passim*

*State v. Dyson*, 872 P.2d 1115 (Wash. 1994). . . . . 26

*Ex parte Ellis*, 309 S.W.3d 71 (Tex. Crim. App. 2010). . . . . 23

*Gilbreath v. State*, 650 So. 2d 10 (Fla. 1995). . . . . 26

*Smith v. Goguen*, 415 U.S. 566 (1974). . . . . 12, 15, 18-19

*Grayned v. City of Rockford*, 408 U.S. 104 (1972).. . . . . 7, 12, 13

*Virginia v. Hicks*, 539 U.S. 113 (2003).. . . . . 5, 6

*Hill v. Colorado*, 530 U.S. 703 (2000). . . . . 19

*State v. Holcombe*, 187 S.W.3d 496 (Tex. Crim. App. 2006). . . . . 14

*Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). . . . . 8, 16-17

*Jasper v. State*, No. 01-13-00799-CR, 2014 WL 265699 (Tex. App.—Houston [1st Dist.] Jan. 23, 2014, no pet.).. . . . . 42

*Johnson v. United States*, 135 S. Ct. 2551 (2015). . . . . 15, 18

*State v. Johnson*, 475 S.W.3d 860 (Tex. Crim. App. 2015). . . . . 5, 6

*Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983), *on reh'g en banc*, 723 F.2d 1164 (5th Cir. 1984). . . . . 20

*Lefevers v. State*, 20 S.W.3d 707 (Tex. Crim. App. 2000). . . . . 41-42

*Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013).. . . . . 4

*Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996).. . . . . 8, 10, 16, 20, 38

*State ex rel. Lykos v. Fine*, 330 S.W.3d 904 (Tex. Crim. App. 2011). . . . . 22

*McCullen v. Coakley*, 573 U.S. 464 (2014). . . . . 5

*McFadden v. United States*, 135 S. Ct. 2298 (2015). . . . . 14

*McGruder v. State*, 483 S.W.3d 880 (Tex. Crim. App. 2016). . . . . 5

*Miller v. California*, 413 U.S. 15 (1973). . . . . 3, 28-29, 37, 38

*Ex parte Nuncio*, 579 S.W.3d 448 (Tex. App.—San Antonio 2019, pet. granted).. . . . . 10, 22, 31

*Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014) . . . . 10

*United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014). . . . . 26

*Ex parte Perry*, 483 S.W.3d 884 (Tex. Crim. App. 2016). . . . . 6, 22

*Pettijohn v. State*, 782 S.W.2d 866 (Tex. Crim. App. 1989). . . . . 41

*R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).. . . . . 4, 5, 10, 25

*Rendon v. State*, No. 03-07-00616-CR, 2008 WL 4682434 (Tex. App.—Austin Oct. 24, 2008, no pet.). . . . . 42

*State v. Ross*, 573 S.W.3d 817 (Tex. Crim. App. 2019). . . . . 14, 38-39

*Roth v. United States*, 354 U.S. 476 (1957). . . . . 13

*United States v. Salerno*, 481 U.S. 739 (1987). . . . . 5

*Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076 (Tex. App.—Amarillo Apr. 8, 2019, pet. filed). . . . . 31

*Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010).. . . . . *passim*

*Screws v. United States*, 325 U.S. 91 (1945). . . . . 36

*United States v. Stevens*, 559 U.S. 460 (2010). . . . . 5, 25

*Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014). . . . . 4-6, 30

*State v. Thorne*, 333 S.E.2d 817 (Va. 1985). . . . . 26

*Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). . . . . 7, 8, 18

*Wagner v. State*, 539 S.W.3d 298 (Tex. Crim. App. 2018). . . . . 12, 26

*Ward v. Rock Against Racism*, 491 U.S. 781 (1989). . . . . 13, 30

*Watson v. State*, 369 S.W.3d 865 (Tex. Crim. App. 2012). . . . . 16

*United States v. Williams*, 553 U.S. 285 (2008). . . . . *passim*

*Williams-Yulee v. Fla. B.*, 135 S. Ct. 1656 (2015). . . . . 4

*Gooding v. Wilson*, 405 U.S. 518 (1972). . . . . 20

*Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014). . . . . 30-31

Statutes and Rules

TEX. PENAL CODE § 6.04(b)(2). . . . . 40

TEX. PENAL CODE § 42.01(a)(8). . . . . 38

TEX. PENAL CODE § 42.07(a)(1). . . . . 2, 23

TEX. PENAL CODE § 42.07(b)(3). . . . . 2, 23

Other sources

Acts 1983, 68th Leg. R.S., p. 2204, ch. 411, § 1, eff. Sept. 1, 1983. . . . . 41

https://www.collinsdictionary.com/us/dictionary/english. . . . . 37

https://dictionary.cambridge.org/us/dictionary/english. . . . . 37

https://www.macmillandictionary.com/us/dictionary/american. . . . . 37, 38

https://www.merriam-webster.com/dictionary. . . . . 37

https://www.vocabulary.com/dictionary. . . . . 37

No. PD-0478-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

**Ex parte Leonardo Nuncio, Appellant**

* * * * *

# STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant cannot complain about the vagueness of the harassment by obscenity statute, TEX. PENAL CODE § 42.07(a)(1), because he is alleged to have done precisely what it told him not to do.

## STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument. The State does not join appellant's renewed request for argument but will appear to assist the Court if requested.

## ISSUE PRESENTED

As explained in detail below, the only issue properly before this Court is whether Section 42.07(a)(1) is unconstitutionally vague.[1]

[1] Any reference to a "section" or "subsection" is to the penal code unless otherwise stated.

## STATEMENT OF FACTS

Appellant was charged with a violation of TEX. PENAL CODE § 42.07(a)(1), harassment by obscenity, which says:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> (1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene[.]

"Obscene" means "containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function."[2]

The information alleged that appellant

> did then and there, with intent to harass, annoy, alarm, abuse, torment, or embarrass [complainant], initiate communication with the complainant, and in the course of the communication, make an obscene comment, to-wit: making comments about her breasts, asking about her; sexual history, and/or telling she could not be a virgin and work for him.[3]

The complaint elaborated that appellant told the complainant to "text your boyfriend so you all can do a quickie in the back [of appellant's place of business.]"[4]

---

[2] TEX. PENAL CODE § 42.07(b)(3).

[3] 1 CR 152.

[4] 1 CR 150.

## SUMMARY OF THE ARGUMENT

A defendant cannot complain about the vagueness of a statute if that statute has a clear, central focus—a "core"—that applies to him. This is so regardless of whether the statute impacts protected speech. The harassment statute in this case does not impact protected speech but, even if it did, appellant's alleged conduct falls squarely within the core of the statute. In fact, the statute gives all persons of ordinary intelligence adequate notice of what is prohibited.

## ARGUMENT

### I. The only issue in this case is vagueness.

Appellant presents an argument on vagueness, overbreadth, and the viability of the *Miller v. California*[5] standard for obscenity. The last argument was denied review and is not properly before this Court.[6] But neither is a true overbreadth claim or what appellant now calls an overbreadth claim. A review of these doctrines and the record shows why.

A. Three distinct doctrines.

There is a lot of confusion about the law applicable to "speech" cases. Distinguishing the common claims reveals that a facial overbreadth claim is not properly before this Court.

---

[5] 413 U.S. 15 (1973).

[6] It was ground 5 in his petition. PDR at 5.

1. Scrutiny analysis

The traditional way to facially challenge a restriction on speech is "scrutiny analysis." Regulation of protected speech is reviewed under one of two levels of scrutiny: strict or intermediate.[7] Both standards require that a statute be appropriately tailored to suit the requisite level of government interest.[8] Unlike most facial challenges, which place the burden on the challenger,[9] strict scrutiny forces the State to prove the statute's constitutionality. This almost invariably results in a finding of unconstitutionality,[10] which is why its applicability is often *the* issue in a scrutiny case. Strict scrutiny applies to "content-based" restrictions, *i.e.*, those which "'raise[] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace [of ideas.]'"[11]

---

[7] There are slight variations, like the test for restrictions on time, place, and manner, discussed below.

[8] Under strict scrutiny, the regulation must serve a compelling government interest and be the "least restrictive means," *i.e.*, narrowly drawn or tailored. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Ex parte Thompson*, 442 S.W.3d 325, 344 (Tex. Crim. App. 2014). Under intermediate scrutiny, the regulation must promote a substantial interest and the means chosen must not be substantially broader than necessary to serve that interest. *Ex parte Thompson*, 442 S.W.3d at 345.

[9] *See Ex parte Lo*, 424 S.W.3d 10, 14-15 (Tex. Crim. App. 2013) (orig. op.) (statutes typically enjoy a presumption of validity).

[10] *See Williams-Yulee v. Fla. B.*, 135 S. Ct. 1656, 1665-66 (2015) ("We have emphasized that 'it is the rare case' in which a State demonstrates that a 'speech restriction is narrowly tailored to serve a compelling interest.") (citation omitted).

[11] *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387 (1992) (citation omitted).

2. The overbreadth doctrine

Overbreadth is not scrutiny analysis.[12] The overbreadth doctrine is an exception to many of the normal rules for facial challenges.[13] "[U]nder the First Amendment's 'overbreadth' doctrine, a law may be declared unconstitutional on its face, even if it may have some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment."[14] The Supreme Court "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[15]

But there are "substantial costs" to interfering with legitimate government interests.[16] "Although [laws that touch on speech], if too broadly worded, may deter

---

[12] *See*, *e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 496 n.9 (2014) ("Because we find that the Act is not narrowly tailored, we need not consider . . . petitioners' overbreadth challenge."); *United States v. Stevens*, 559 U.S. 460, 473 (2010) (declining to revisit the circuit court's strict scrutiny analysis in favor of an overbreadth analysis, calling it "a second type of facial challenge"); *R.A.V.*, 505 U.S. at 381 n.3 (distinguishing "a technical 'overbreadth' claim – *i.e.*, a claim that the ordinance violated the rights of too many third parties" from "the contention that the ordinance was 'overbroad' in the sense of restricting more speech than the Constitution permits, even in its application to him, because it is content based."); *Ex parte Thompson*, 442 S.W.3d at 349 (questioning whether, having found a statute to be an invalid content-based restriction, it needed to address overbreadth).

[13] *Virginia v. Hicks*, 539 U.S. 113, 118 (2003).

[14] *State v. Johnson*, 475 S.W.3d 860, 864-65 (Tex. Crim. App. 2015). It does not exist outside of the First Amendment context. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *McGruder v. State*, 483 S.W.3d 880, 883 (Tex. Crim. App. 2016).

[15] *Hicks*, 539 U.S. at 119.

[16] *Id*.

protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify . . . prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe."[17] The "'strong medicine'" of facial invalidation for overbreadth is thus "to be employed with hesitation and only as a last resort."[18]

The overbreadth doctrine does not concern itself with whether a statute is "content-based"; the defendant bears the burden to prove the statute's overbreadth.[19] And that overbreadth must be "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[20] Moreover, "the danger that the statute will be unconstitutionally applied must be realistic and not based on 'fanciful hypotheticals.'"[21] Whatever *un*substantial overbreadth that "may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."[22]

---

[17] *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

[18] *Ex parte Thompson*, 442 S.W.3d at 349 (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)).

[19] *Hicks*, 539 U.S. at 122; *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016); *Johnson*, 475 S.W.3d at 865.

[20] *Johnson*, 475 S.W.3d at 865 (citation omitted).

[21] *Id*.

[22] *Broadrick* at 615-16.

3. Vagueness

Another type of facial challenge is a vagueness challenge. A statute is impermissibly vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[23] A "more stringent vagueness test" applies when protected speech is affected[24] because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."[25] Put another way, the statute must be "sufficiently definite to avoid chilling protected expression."[26]

Vagueness is not overbreadth. They do not even arise out of the same constitutional right. "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment."[27] "[A] Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression[,]" as would be the case if the challenger

---

[23] *United States v. Williams*, 553 U.S. 285, 304 (2008).

[24] *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

[25] *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotations omitted).

[26] *State v. Doyal*, __ S.W.3d __, No. PD-0254-18, 2019 WL 944022, at *5 (Tex. Crim. App. Feb. 27, 2019), reh'g denied (June 5, 2019). As discussed below, the scope of First Amendment doctrine applicable to vagueness claims is an issue with this Court.

[27] *Williams*, 553 U.S. at 304. *See also Sessions v. Dimaya*, 138 S. Ct. 1204, 1233 (2018) (Gorsuch, J., concurring) ("Vagueness doctrine represents a procedural, not a substantive, demand.").

had "a valid overbreadth claim under the First Amendment."[28] "Otherwise the doctrines would be substantially redundant."[29]

Moreover, vagueness and overbreadth must be different because one cannot apply both doctrines. "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[30] A statute is unconstitutionally vague precisely because its coverage cannot be ascertained. When that happens, a court should not reach overbreadth.[31]

B. There is no true overbreadth claim before this Court.

1. Appellant never made one in any court.

Although appellant recited overbreadth law in the trial court and on appeal,[32] his analysis never got past step one—statutory construction. His point was (and is)

---

[28] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010).

[29] *Id*. As discussed below, both the Supreme Court and this Court have said the opposite. *See Long v. State*, 931 S.W.2d 285, 288 (Tex. Crim. App. 1996) (discussing "First Amendment considerations" that are "intertwined with the vagueness issue").

[30] *Williams*, 553 U.S. at 293.

[31] *See*, *e.g.*, *Doyal*, 2019 WL 944022, at *10 (striking statute for vagueness but not addressing overbreadth). As the Supreme Court said in *Hoffman Estates*:

> Flipside also argues that the ordinance is "overbroad" because it could extend to "innocent" and "lawful" uses of items as well as uses with illegal drugs. This argument seems to confuse vagueness and overbreadth doctrines. If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness.

455 U.S. at 497 n.9 (citations omitted).

[32] Writ at 11-13; App. 4th Br. at 35-37.

that the statute is unconstitutionally vague in nearly all aspects.[33] His suggestions to "narrow" or "fix" the statute served his vagueness argument, not overbreadth.[34] His claim the statute was overbroad and chills speech was a justification for a greater level of specificity[35] and for avoiding showing the statute is vague as to him.[36] As appellant explained at the hearing, his "overbreadth" argument was merely a facet of his vagueness argument—the point at which vagueness and the First Amendment "intersect."[37]

2. Appellant did not ask for review of one.

Given the state of the record, the court of appeals should not have addressed overbreadth. But it did. Sort of. The court of appeals decided the statute is not overbroad because the requisite intent to harass means no protected speech is

---

[33] *See*, *e.g.*, Writ at 79 ("ultimate sex act"), 92 (how the intended victim has to perceive the communication), 92 (specific intent to "embarrass"), 94 (who has to find the communication "patently offensive"), 95-97 (the definition of "obscenity"); App. 4th Br. at 39-42 ("ultimate sex act" unclear), 43-50 ("obscenity"), 55-57 (who must be offended), 61 ("embarrass").

[34] *See*, *e.g.*, Writ at 56 ("Inclusion of these elements would create a standard for criminality that is identifiable and understood by the actor, at the time of the commission of the acts constituting the crime."); App. 4th Br. at 54 (if fixed, "people of ordinary intelligence would have no difficulty discerning harassing conduct worthy of criminal prosecution.").

[35] 1 RR 11; App. 4th Br. at 34-35.

[36] Writ at 12 ("Overbreadth does not require the Applicant to show that the statute is vague as applied to him."); App. 4th Br. at 36. Again, this will be discussed below.

[37] Writ at 7; App. 4th Br. at 34. *See also* 1 RR 10-11 (saying that "the third element of [his] vagueness challenge," *i.e.*, "the First Amendment argument, that the statute is not sufficiently definite to avoid a chilling effect," "is also the overbreadth challenge.").

prohibited.[38] This Court's review fairly includes the latter portion of the holding because, again, appellant is arguing for better procedural and substantive treatment due to the effect on protected speech. But appellant did not rely on any overbreadth cases or articulate or apply the standard even in plain language.[39] The only thing reminiscent of overbreadth is his use of variations of the words "chill" or "broad" in three of his questions presented.[40] Without more, however, those words are a poor indicator of which doctrine is being invoked because they are used in many First Amendment contexts,[41] including this Court's prominent vagueness cases.[42]

3. Appellant isn't making one now.

Even if true overbreadth had been raised in his writ, on appeal, and in his petition, what appellant now argues before this Court is not overbreadth. As he

---

[38] *Ex parte Nuncio*, 579 S.W.3d 448, 456 (Tex. App.—San Antonio 2019, pet. granted).

[39] He notes that the court of appeals cited *State v. Johnson* but he does not point out that *Johnson* is an overbreadth case or rely on it in any fashion. PDR at 15.

[40] Questions 2, 3, and 4.

[41] *See*, *e.g.*, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014) ("We crafted the *Noerr–Pennington* doctrine—and carved out only a narrow exception for 'sham' litigation—to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances."); *R.A.V.*, 505 U.S. at 381 n.3 (distinguishing between a "technical 'overbreadth' claim" and a claim an ordinance is "overbroad" in the sense of restricting more speech than the Constitution permits because it is content based).

[42] *See*, *e.g.*, *Doyal*, 2019 WL 944022, at *5 ("When the law also implicates First Amendment freedoms, it must also be sufficiently definite to avoid chilling protected expression."); *Long*, 931 S.W.2d at 293 ("In the absence of any nexus between the threat requirement and the conduct requirement, there is a real likelihood that the statute could chill the exercise of protected First Amendment expression.").

repeatedly says, it is an argument for the application of strict scrutiny.[43] Despite reciting overbreadth language,[44] appellant never applies the overbreadth test. Instead, his conclusion flows from the State's alleged failure to prove the statute satisfies strict scrutiny by complying with "*Miller v. California*'s baseline requirements for an obscenity statute."[45] There is a lot wrong with that argument, but it is not an overbreadth argument by any stretch. As important, it was never presented to the trial court or on appeal.[46]

C. This Court shouldn't address an unpreserved, undecided, and ungranted issue.

Whatever considerations scrutiny analysis, facial overbreadth, and vagueness share do not include preservation of one by raising the other. Appellant lost in the trial court and on appeal and is now asking this Court to address a novel take (that was not preserved or presented to the court of appeals) on a distinct claim (that was not itself properly preserved or presented to the court of appeals) neither of which were included in his petition. This Court should decline.

---

[43] *See*, *e.g.*, App. CCA Br. at 30 ("2.1. STRICT SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW."), 32 ("2.2. THE STATUTE RESTRICTS SPEECH BASED ON ITS CONTENT."), 33 ("2.3. THE STATUTE IS PRESUMED TO BE UNCONSTITUTIONAL."), 36 ("2.8. SECTION 42.07(A)(1) (sic) CANNOT SURVIVE STRICT SCRUTINY.").

[44] App. CCA Br. at 30, 36.

[45] App. CCA Br. at 36.

[46] The only thing that comes close to invoking scrutiny review is an isolated sentence in the summary of his argument on appeal that he never pursued. App. 4th Br. at 7 ("The overly restrictive statute serves **no compelling government interest**.") (emphasis in original).

II. Vagueness law.

A. Perfection is not required.

As stated above, "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[47] The second part may be the most important: "Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law" that it "allows policemen, prosecutors, and juries to pursue their personal predilections."[48]

But the Constitution does not require perfection. "Condemned to the use of words, we can never expect mathematical certainty from our language."[49] A statute is not unconstitutionally vague merely because the words or terms used must be construed.[50] Nor is a statute rendered vague because "close cases can be envisioned"; "[c]lose cases can be imagined under virtually any statute."[51] "What renders a statute

---

[47] *Williams*, 553 U.S. at 304. The basic test for vagueness was written almost 100 years ago. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) ("a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

[48] *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974).

[49] *Grayned*, 408 U.S. at 110.

[50] *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018).

[51] *Williams*, 553 U.S. at 305-06.

vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."[52] Even a statute "marked by flexibility and reasonable breadth, rather than meticulous specificity," can be upheld if its interpretation makes it "clear what the ordinance as a whole prohibits."[53] Finally, lack of immunity from discretion is not fatal. "As always, enforcement requires the exercise of some degree of police judgment,"[54] and "it is common experience that different juries may reach different results under any criminal statute[; t]hat is one of the consequences we accept under our jury system."[55]

To determine what a statute prohibits, a reviewing court must consider the plain language, the court's interpretations of analogous statutes, and, "perhaps to some degree, . . . the interpretation of the statute given by those charged with enforcing it."[56] While many terms have expansive meanings that could lead to lack

---

[52] *Williams*, 553 U.S. at 306.

[53] *Id*. (internal quotation and citation omitted).

[54] *Grayned*, 408 U.S. at 114; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (upholding ordinance despite "undoubtedly flexible" standards giving officials "considerable discretion").

[55] *Roth v. United States*, 354 U.S. 476, 492 n.30 (1957).

[56] *Grayned*, 408 U.S. at 110.

of notice or arbitrary enforcement, the inclusion of an objective standard[57] or scienter requirement[58] can alleviate, if not eliminate, that danger.

B. But the statute must have a "core."

The most obvious example of an unconstitutionally vague statute is one that on its face has no specified standard at all, *i.e.*, no "core." In *Coates v. City of Cincinnati*, for example, Coates was charged with assembling "in a manner annoying to persons passing by."[59] The court said the ordinance "is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard."[60] Because it was unclear "upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer,

---

[57] *See Williams*, 553 U.S. at 306 ("Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was "annoying" or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."); *State v. Ross*, 573 S.W.3d 817, 823-24 (Tex. Crim. App. 2019) (the "reasonable-person standard greatly reduces . . . susceptibility to a vagueness challenge"); *State v. Holcombe*, 187 S.W.3d 496, 500 (Tex. Crim. App. 2006) ("Although the noise ordinance does allow a degree of police judgment, that judgment is confined to the judgment of a reasonable person.").

[58] *Williams*, 553 U.S. at 306 ("Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is 'annoying' or 'indecent.'"), *id*. at 306 (a statute is not vague when it requires the jury to answer "clear questions of fact" like the defendant's belief or intent); *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) ("a scienter requirement in a statute alleviates vagueness concerns, narrows the scope of its prohibition, and limits prosecutorial discretion.") (cleaned up); *Doyal*, 2019 WL 944022, at *5 ("A scienter requirement in the statute may sometimes alleviate vagueness concerns but does not always do so.").

[59] 402 U.S. 611, 611 (1971).

[60] *Id*. at 614.

or the sensitivity of a hypothetical reasonable man[,]"[61] "no standard of conduct [wa]s specified at all."[62]

Quoting *Coates*, the court later said that such a provision "is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' Such a provision simply has no core."[63]

C. The presence of a "core" determines who can complain about what.

This type of total failure has important substantive and procedural consequences. As shown above, it has never been the case that a statute is facially vague just because there are some situations in which its application is unclear. The corollary to this is that a statute that provides no standard of conduct—has no "core"—is facially unconstitutional regardless of whether "there is some conduct that clearly falls within the provision's grasp."[64] Thus, it is not strictly true that a statute must be vague in all its applications to be unconstitutionally vague.[65]

---

[61] *Id*. at 613. *See also id*. at 614 ("violation may entirely depend upon whether or not a policeman is annoyed").

[62] *Id*. at 614.

[63] *Goguen*, 415 U.S. at 578 (quoting *Coates*, 402 U.S. at 614).

[64] *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015). *See Coates*, 402 U.S. at 616 ("The details of the offense could no[t] . . . serve to validate this ordinance[.]").

[65] *Johnson*, 135 S. Ct. at 2561.

The concept of a "core" violation also has important procedural ramifications because it dictates who can raise a facial complaint. The general rule for pretrial challenges is that an appellant who engages in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others.[66] In 1996, this Court cited the Supreme Court for the exception that "a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct" if it involves "First Amendment considerations."[67] In 2010, however, the Supreme Court said the opposite.

In *Holder v. Humanitarian Law Project*, the court discussed the reasons for prohibiting a facial challenge when the statute is not vague as to the person bringing the challenge. It chided the court of appeals for merging a vagueness challenge with First Amendment claims and for addressing a facial vagueness challenge rather than the as-applied challenge that was raised.[68] The Supreme Court viewed the lower court's choices as an apparent incorporation of "elements of First Amendment overbreadth doctrine."[69] It disapproved:

---

66 *Watson v. State*, 369 S.W.3d 865, 871 (Tex. Crim. App. 2012).

67 *Long*, 931 S.W.2d at 288 (citing *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)).

68 561 U.S. at 19.

69 *Id*.

> [T]he Court of Appeals contravened the rule that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *That rule makes no exception for conduct in the form of speech*. Thus, even to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others.[70]

The court was emphatic in its rejection of the application of some kind of overbreadth rationale to vagueness.[71] It concluded:

> [T]he dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail. Even assuming that a heightened standard applies because the material-support statute potentially implicates [protected] speech, the statutory terms are not vague as applied to plaintiffs.[72]

*Humanitarian Law Center* is thus a considered opinion that there is no "First Amendment" exception to the rule that a defendant cannot complain about vagueness when the law is clear as to his conduct. It is an explicit rejection of the "intertwined" nature of vagueness and overbreadth underlying *Long*.

---

[70] *Id*. at 20 (citations omitted) (emphasis added).

[71] *Id*. ("[O]ur precedents make clear that a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression. Otherwise the doctrines [of vagueness and overbreadth] would be substantially redundant.").

[72] *Id*. at 21.

This Court appeared to disagree earlier this year in *State v. Doyal*, relying on the "even more recent case" of *Johnson v. United States*.[73] But neither *Johnson* nor the subsequent Supreme Court case noting *Johnson*'s holding[74] mentioned *Humanitarian Law Project*, or framed the issue in terms of the availability of the claim (as opposed to the applicable standard of review), or mentioned the First Amendment. All *Johnson* did was reaffirm the reasoning of *Coates*, which it cited, and disavow (unidentified) opinions that could be read to say the opposite.[75] *Humanitarian Law Center* explicitly rejected the application of First Amendment law undergirding the exception in *Long*. It should not be assumed that *Johnson*, which did not involve the First Amendment, reversed this pointed holding *sub silentio*.

Any tension between the general rules reaffirmed in *Humanitarian Law Center* and *Johnson* can be explained by the dichotomy recognized by that court in 1974 in *Smith v. Goguen*:

> Appellant's exhaustion-of-remedies argument is premised on the notion that Goguen's behavior rendered him a hard-core violator as to whom the statute was not vague, whatever its implications for those engaged in different conduct. To be sure, there are statutes that by their terms or

---

[73] *Doyal*, 2019 WL 944022, at *4.

[74] *Dimaya*, 138 S. Ct. at 1214 n.3.

[75] 135 S. Ct. at 2560-61. The *Johnson* majority was most likely referring to cases like *Hoffman Estates*, which said, "The court . . . should uphold the challenge only if the enactment is impermissibly vague in all of its applications[,]" 455 U.S. at 494-95, and which was quoted for such by the *Johnson* dissent. 135 S. Ct. at 2581-82.

> as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain. The hard-core violator concept makes some sense with regard to such statutes.[76]

The court refused to apply that rule because the statute at issue "[wa]s not in that category.[77] Quoting *Coates*, it held the statute vague because "no standard of conduct is specified at all."[78] "Such a provision simply has no core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause."[79]

It is only when the statute "simply has no core" that the rule of *Coates* and *Goguen*—and, thus, of *Johnson*—applies.[80] When that is not the case, *i.e.*, when there is some "core" that applies to the defendant even if the statute is vague as to a substantial number of other defendants,[81] the basic rule—re-established for *all* vagueness claims in *Humanitarian Law Center*—applies.

---

[76] 415 U.S. at 577-78.

[77] *Id*. at 578.

[78] *Id*. (quoting *Coates*, 402 U.S. at 614).

[79] *Id*.

[80] *Id*.

[81] *See Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'") (citation omitted).

D. This is a good idea, but not a new one.

Ironically, the idea that a "hard-core violator" cannot stand in another's shoes when challenging the vagueness of a statute can be found in the Supreme Court case at the headwaters of the *Long* exception. *Long* cited *Gooding v. Wilson*,[82] which relied on *Dombrowski v. Pfister*.[83] In *Dombrowski*, the Supreme Court utilized a "chilling effect" rationale to permit seeking injunctive relief from enforcement of allegedly "overly broad and vague regulations of expression."[84] But the Supreme Court said something else that should shape this Court's view:

> On this view of the "vagueness" doctrine, it is readily apparent that abstention [from interference in state law enforcement] serves no legitimate purpose where a statute regulating speech is properly attacked on its face, and where, as here, the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution *and is not the sort of "hardcore" conduct that would obviously be prohibited under any construction*.[85]

*Dombrowski* thus contained a notable exception that has been lost in translation: permitting injunction for vagueness makes no sense if, *inter alia*, the statute

---

[82] *Long*, 931 S.W.2d at 288; *see Gooding v. Wilson*, 405 U.S. 518, 520 (1972). *Long* also cited *Kramer v. Price*, 712 F.2d 174, 176 n.3 (5th Cir. 1983), on reh'g, 723 F.2d 1164 (5th Cir. 1984), which relied on *Gooding v. Wilson*.

[83] 380 U.S. 479 (1965).

[84] *Id*. at 486-87, 490.

[85] *Id*. at 491-92 (emphasis added).

obviously applies to the person seeking it. This limitation was restored in *Humanitarian Law Project*.

And it makes sense. The idea that a statute is vague enough to violate due process even though it can be predictably applied to one defendant—*Johnson*'s point—is not the same thing as allowing *that* defendant to raise a facial challenge. A defendant who commits "the sort of 'hardcore' conduct that would obviously be prohibited under any construction"[86] of the statute does not need protection just because many others might have a Fifth Amendment complaint, or because invalid First Amendment applications can be conceived of. The Supreme Court could have reasonably concluded that it need not invite the same tsunami of windfall claims with vagueness challenges that the overbreadth doctrine has created.

Finally, it should be remembered that the Supreme Court's reluctance to review—let alone strike—a statute for vagueness if the relevant interests do not apply to the complaining party is an exercise in judicial conservatism. Regardless of whatever irregularities might result if a defendant is convicted under a statute that is subsequently invalidated on a "better" defendant's claim,[87] a court should not weigh into an analysis of hypothetical applications on the off chance some might later arise.

---

[86] *Id*. at 492.

[87] *Doyal*, 2019 WL 944022, at *4 n.35.

In this context, it is a policy choice the Supreme Court has decided contrary to this Court's decision in *Long*.

III. Appellant's vagueness claim fails because he makes no as-applied challenge and committed a "core" violation.

A. Appellant does not claim *he* had no notice.

Although appellant mentioned an as-applied challenge in his writ,[88] he relied primarily on the argument that he need not prove it because of his "overbreadth intersection" argument.[89] The court of appeals understood him to be making only a facial challenge.[90] Appellant has accepted that characterization[91] and makes no argument that he had no notice that his alleged conduct was prohibited.

As per *Humanitarian Law Center*, appellant's vagueness claim should be rejected because he no longer claims the statute is vague as applied to him. This is not to say that an as-applied challenge would itself be cognizable in a pretrial writ—it is not.[92] But a complaining party must at least attempt to show that he can pass an

---

[88] 1 CR 10, 18-19.

[89] 1 CR 21 ("15. Overbreadth does not require the Applicant to show that the statute is vague as applied to him.").

[90] *Ex parte Nuncio*, 579 S.W.3d at 451.

[91] App. CCA Br. at 9 ("This case arises from a pre-trial writ of habeas corpus wherein Appellant, Leonardo Nuncio, challenged the facial constitutionality of . . . .").

[92] *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011) ("as applied" challenges cannot be decided pretrial because they require evidence). *But see Ex parte Perry*, 483 (continued...)

examination of his alleged conduct "designed to quickly dispose of unmeritorious facial claims."[93]

B. Appellant's conduct fits squarely within the "core" prohibited conduct.

Appellant's failure might be excused if the statute has no "core" that plainly prohibited his conduct. But it has an obvious core, even when "heightened specificity" is applied. And appellant did exactly what the statute told him not to. The statute says, in applicable part:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person:
>
> > (1) initiates communication and in the course of the communication makes a comment, request, suggestion, or proposal that is obscene[.]
>
> . . .
>
> (b)(3) "Obscene" means containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function.

Without a deep dive into statutory construction—which would defeat the policy favoring quick dispositions at this stage[94]—the statute requires four things:

---

[92](...continued)
S.W.3d at 895 (listing exceptions to this rule).

[93] *Ex parte Ellis*, 309 S.W.3d 71, 82 (Tex. Crim. App. 2010).

[94] *See id.* ("an appellate court should not address a novel statutory construction argument when, under established law, the defendant's facial challenge is clearly without merit.").

1) The person has the intent to harass.
2) He starts a conversation.
3) He says something that contains either
   a) a description of or solicitation for an "ultimate sex act," or
   b) a description of an excretory function.
4) The description or solicitation is patently offensive.

It is clear that the statute has a "core," *i.e.*, a standard of conduct that people of ordinary intelligence can understand. It is also clear that appellant's alleged conduct falls squarely within this core. Again, appellant is accused of making numerous rude comments of a sexual nature to a woman, culminating in the request that the woman have sex with her boyfriend in his restaurant. If appellant believes the evidence will be insufficient, or that this is a "close case" in which his conduct falls just on the lawful side of the statute, that's what trial is for.[95] This Court should not entertain a full, facial challenge for hypothetical overheard poetry battles[96] when the statute plainly applies to the defendant's conduct.

IV. There are no First Amendment considerations in this case.

If this Court maintains that *Humanitarian Law Center* did not abrogate the rule in *Long*, appellant is in no better position than was Scott. This Court rejected Scott's facial vagueness challenge because the statute "d[id] not implicate the free-speech

---

[95] *Williams*, 553 U.S. at 306 ("The problem [of close cases] is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.").

[96] App. CCA Br. at 28-29.

guarantee of the First Amendment" and Scott did not argue that it was vague as applied to him.[97] Assuming that *Doyal* did not overrule *Scott*'s holding on this point, appellant's failure to claim on appeal that the statute is vague as to him is also fatal because the statute does not improperly restrict protected speech.

Appellant says, without citation or explanation, "Speech does not become unprotected merely because it is intended to harass, alarm, abuse or embarrass."[98] From context, it appears that appellant is arguing that only speech on the list he provides is unprotected.[99] What he misses is that the conduct at issue in this case is 1) non-communicative, meaning it is not speech at all; 2) obscene, meaning it can be proscribed based on content; or, 3) validly restricted as to manner.

A. Intentional harassment is not communication.

1. This Court said so in *Scott*.

In *Scott*, this Court held that another subsection of this statute does not apply to "communicative conduct that is protected by the First Amendment" because the actor's conduct "will be, in the usual case, essentially noncommunicative, even if the

---

[97] *Scott v. State*, 322 S.W.3d 662, 665, 670-71 (Tex. Crim. App. 2010).

[98] App. CCA Br. at 34.

[99] App. CCA Br. at 34. *See generally Stevens*, 559 U.S. at 470-72 (acknowledging "categories of speech as fully outside the protection of the First Amendment"). *But see R.A.V.*, 505 U.S. at 383 (rejecting the idea of "obscenity 'as not being speech at all'"; they can be regulated because of their proscribable content, not because "they are categories of speech entirely invisible to the Constitution.").

conduct includes spoken words."[100] Although the Court noted three elements, it focused on two: 1) someone whose conduct satisfies the elements "will have only the intent to inflict emotional distress for its own sake[,]" and, 2) to the extent any of it is "communicative," such conduct would constitute an intolerable invasion of privacy.[101] Courts around the country agree that intentional harassment is not First Amendment speech.[102]

---

[100] *Scott*, 322 S.W.3d at 669-70.

[101] *Id*. at 670. *See also Wagner*, 539 S.W.3d at 311 (applying *Scott*'s reasoning to uphold a protective order statute that prohibits harassing communications because it is "capable of reaching only conduct that is not entitled to constitutional protection because such conduct will, by definition, invade the substantial privacy interests of the complainant in an essentially intolerable manner."); *Ex parte Thompson*, 442 S.W.3d at 342-43 (distinguishing *Scott* because, unlike § 42.07(a)(4), "the statute at issue in the present case is not limited to expressive activity that occurs in relatively private settings nor to activity that intentionally inflicts emotional harm on the victims.").

[102] *United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014) ("Osinger engaged in a course of conduct "with the intent ... to ... harass, or intimidate, or cause substantial emotional distress to" V.B. . . . Any expressive aspects of Osinger's speech were not protected under the First Amendment because they were 'integral to criminal conduct' in intentionally harassing, intimidating or causing substantial emotional distress") (overruling as-applied challenge to federal stalking statute); *Gilbreath v. State*, 650 So. 2d 10, 12 (Fla. 1995) ("it is the conduct of intentionally making such a call into a place of expected privacy, not pure speech, which is proscribed" because the statute requires "the intent to annoy, abuse, threaten, or harass the recipient of the call"); *State v. Dyson*, 74 Wash. App. 237, 243, 872 P.2d 1115, 1119 (1994) ("[The statute] regulates conduct implicating speech, not speech itself. Although [the statute] contains a speech component, it is clearly directed against specific conduct—making telephone calls with the intent to harass, intimidate, or torment another while using lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act.") (citation omitted); *State v. Thorne*, 175 W. Va. 452, 454, 333 S.E.2d 817, 819 (1985) ("Harassment is not communication, although it may take the form of speech. The statute prohibits only telephone calls made with the intent to harass. Phone calls made with the intent to communicate are not prohibited."). *Thorne* was quoted in *Scott*, 322 S.W.3d at 670 n.14.

The subsection at issue is non-communicative for the same reason. It has the same intent to harass as the offense in *Scott* because they are manners and means of the same offense. Further, "initiat[ing] communication" to say something "containing a patently offensive description of or a solicitation to commit an ultimate sex act, including sexual intercourse, masturbation, cunnilingus, fellatio, or anilingus, or a description of an excretory function" is at least the "inva[sion of] the substantial privacy interests of another (the victim) in an essentially intolerable manner"[103] that repeated, nondescript phone calls are.

2. There is a difference between unprotected speech and non-speech.

Each of the types of speech appellant says are unprotected have one characteristic the conduct underlying *Scott*'s rationale does not—the intent to communicate an idea. In fact, they are on the list *because of their message*. "Advocating imminent lawless action," "fighting words," and "true threats" can be lawfully proscribed because the publication and receipt of those ideas is bad. Criminalizing conduct committed with the intent to harass is different. While the words used might also be specifically illegal (and perhaps validly prohibited under other sections of the Penal Code as "speech integral to criminal conduct"), the State does not have to prove the intended communication of any idea. One can harass with

---

[103] *Scott*, 322 S.W.3d at 670.

non-verbal screaming or with messages the speaker does not care about, as when one spray-paints a swastika just for shock value. It does not have to be "speech" at all.

B. The statute restricts only intentional harassment that is unprotected obscenity.

Even if the conduct proscribed by Section 42.07(a)(1) is not non-communicative as per *Scott*, what it communicates is obscenity under the standard set forth by the Supreme Court in *Miller v. California*. Recognizing "the inherent dangers of undertaking to regulate any form of expression,"[104] that court set out to define what makes the depiction or description of sexual conduct "obscene" and therefore able to be regulated without abridging First Amendment rights. The court promulgated three "basic guidelines":

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[105]

The court made clear that these are guidelines, not language to be cut and pasted into penal codes: "If a state law that regulates obscene material is thus limited, as written

---

[104] 413 U.S. at 23-24.

[105] *Id*. at 24. The repeated emphasis that the statute be "taken as a whole" was part of the court's rejection of the "utterly without redeeming social value" test. *Id*. *See id*. at 24 n.7 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.") (citation omitted).

*or construed*, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[106] Although the court "emphasize[d] that it is not [its] function to propose regulatory schemes for the States,"[107] it did give some helpful examples of the second guideline above: "Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and, "Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[108]

To be clear, Section 42.07(a)(1) is a harassment statute, not an obscenity statute. But, properly construed and taken as a whole, it regulates the defined conduct in accordance with *Miller*:

- An average person, applying contemporary community standards of Texas, would find that someone who uses a patently offensive description of an excretory function or solicitation for sex to harass has a shameful interest in the subject, to say the least.[109]

---

[106] *Id*. at 25 (emphasis added).

[107] *Id*.

[108] *Id*.

[109] *See Andrews v. State*, 652 S.W.2d 370, 376-77 (Tex. Crim. App. 1983) (describing the "correct meaning" of "prurient interest" as "an itching, a morbid or a lascivious interest in sex; or an unusual desire, curiosity, or propensity about sex, or "a loose-lipped sensual leer"[;] or as (continued...)

- The definition of "obscene" in Subsection (b)(3) draws directly from the examples of the second prong given in *Miller*.

- As a "work," intentional harassment lacks serious literary, artistic, political, or scientific value regardless of whether it is non-communicative under *Scott*.

C. Incidental restriction of legitimate, non-obscene communication does not change the calculus.

Because appellant does not mention *Scott*, he does not attempt to distinguish or otherwise deal with it. But Presiding Judge Keller has, and one court of appeals has followed suit. Both are mistaken and, regardless, the conclusion that some protected speech might be implicated does not mean that any "First Amendment considerations" like the quasi-overbreadth rationale of *Long* apply.

1. This Court has not abandoned *Scott*.

In her concurrence to *Wilson v. State*, Presiding Judge Keller said the majority abandoned the applicable holding of *Scott*.[110] In *Wilson*, this Court reviewed the sufficiency of the evidence of a phone harassment conviction.[111] It rejected the idea that a "facially legitimate purpose" for a phone call could negate the intent to harass because 1) the statute carves no exception for calls with "facially legitimate" content,

---

[109](...continued)
describing one who is inclined to lecherous thoughts and desires[;] or as used to describe a shameful or morbid interest in nudity, sex, excretion.") (citations omitted).

[110] 448 S.W.3d 418, 426-27 (Tex. Crim. App. 2014) (Keller, P.J., concurring).

[111] *Id*. at 425.

"however that term may be defined[,]"[112] and 2) "[b]enign content does not always prove benign intent, nor the objective harmlessness of its delivery."[113]

Presiding Judge Keller's argument is that the majority accepted that a speaker can have the intent to harass but also have the intent to communicate an idea—what could be called a "dual intent" situation. But the majority acknowledged Wilson's "intent" argument only to call it irrelevant when the record is viewed in the proper light. The majority did not mention *Scott*, despite Presiding Judge Keller's concurrence, nor did it embrace a theoretical possibility that breaks with the commonsense conclusion that people who act with the intent to harass are rarely trying to communicate. The Fort Worth Court of Appeals recently embraced Presiding Judge Keller's argument.[114] Other courts of appeals, like the one in this case, continue to follow *Scott* and hold that no protected speech is implicated where the intent to harass is an element.[115]

---

[112] *Id*.

[113] *Id*. at 425-26.

[114] *Ex parte Barton*, __ S.W.3d __, No. 02-17-00188-CR, 2019 WL 4866036, at *5 (Tex. App.—Fort Worth Oct. 3, 2019) (on reh'g) (pet. granted PD-1123-19).

[115] *Ex parte Nuncio*, 579 S.W.3d at 456-57 (overbreadth and vagueness of sections 42.07(a)(1) and (b)(3)); *Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *5 (Tex. App.—Amarillo Apr. 8, 2019, pet. granted PD-0469-19) (not designated for publication) (overbreadth of section 42.07(a)(7)); *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142, at *4 (Tex. App.—Austin June 2, 2016, pet. ref'd) (not designated for publication) (overbreadth and vagueness of section 42.07(a)(7)).

2. Legitimate communication can be done without being intentionally harassing and obscene.

Regardless, abandoning *Scott* would not mean that appellant gets to complain about vagueness. If there is such a thing as "dual intent" speech—"legitimate" communication that is intentionally harassing—and if the material prohibited by Section 42.07(a)(1) does not consist entirely of "obscenity," courts must consider whether the speech that is affected is validly restricted. If a defendant wants to benefit from "overvagueness" notwithstanding *Humanitarian Law Center*, he should have to show that there is a substantial amount of protected speech that might be *unlawfully* restricted when compared to the legitimate sweep of the statute. Put another way, if there is such a thing as a legitimate communication that is intentionally harassing and obscene under subsection (b)(3), is Section 42.07(a)(1) a valid restriction on the manner in which it can be communicated?

a. Some time, place, and manner restrictions are acceptable.

"[E]ven in a public forum[,] the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they

leave open ample alternative channels for communication of the information.'"[116]

The "principal inquiry" is "content neutrality."[117] "Content neutrality" is not determined by the fact that a particular kind of speech is regulated; that exception would swallow the rule. "In some situations, a regulation can be deemed content neutral on the basis of the government interest that the statute serves, even if the statute appears to discriminate on the basis of content."[118] "These situations involve government regulations aimed at the 'secondary effects' of expressive activity."[119] The second step is that the regulation be "narrowly tailored to serve a significant governmental interest."[120] As with intermediate scrutiny, this requirement is satisfied as long as the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[121] The final step is the availability of "ample alternative channels of communication."[122]

---

[116] *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

[117] *Id*.

[118] *Ex parte Thompson*, 442 S.W.3d at 345.

[119] *Id*.

[120] *Ward*, 491 U.S. at 796.

[121] *Id*. at 799 (quotation and citation omitted).

[122] *Id*. at 802.

b. "Dual intent" communicators can find another way.

Whatever merit a "dual intent" argument has in the context of telephone harassment, it is hard to see what "facially legitimate" communication can be prosecuted under Section 42.07(a)(1). Because this is a version of intermediate scrutiny, appellant has the burden to show that his words had a "facially legitimate purpose" despite being intentionally harassing *and* containing a patently offensive description or solicitation of an ultimate sex act. How would that work?

Using the allegations in this case, not well. According to the complaint and information, appellant:

- conducted a two-hour interview with the victim to work at his restaurant;
- made several rude comments about her body;
- told her she "can't be a virgin" if she wants to work there; and
- told her to text her boyfriend to have "a quickie" in the back of the restaurant.[123]

Unlike the innocuous-in-the-abstract nature of at least one of Wilson's phone calls, nothing about these facts suggests an intent to do anything other than what is prohibited by the statute. Even if one supplies a better intent—to compliment, perhaps—communicating a compliment that offensively and with the intent to harass or embarrass the victim is something that can be regulated without offending the Constitution. Under the *Ward* rubric, a law protecting people from the effects of

[123] 1 CR 150, 152.

intentional harassment, especially patently offensive sexual harassment, is content-neutral and serves a substantial interest that would obviously be served less well without it. And people in appellant's position have ample alternative channels of communication; there are plenty of ways to compliment a woman without running afoul of Section 42.07(a)(1).[124]

The analysis is worse for the speaker if the intended message is wholly divorced from the obscenity. With the "compliment" example, the reference to an ultimate sex act might make some twisted sense. But initiating a conversation to inflict the harm the statute prohibits using obscenity to discuss climate change or Medicare-for-All makes no sense at all. Again, there are ample (and far more effective) ways to discuss matters of public concern.

V. The statute gives full and fair notice to citizens and law enforcement.

If this Court does wish to review the entire statute, it will find that people of ordinary intelligence have no need to guess at what the statute prohibits.

A. A quick note on substance versus notice.

Because of appellant's conflation of vagueness with overbreadth, his vagueness argument is, in large part, a claim that the statute restricts protected speech. He

---

[124] The Illinois Supreme Court's reached a similar conclusion when it recently upheld its "revenge porn" statute. *See People v. Austin*, __ N.E.3d __, 2019 IL 123910, 2019 WL 5287962, *16 (¶ 86) (October 18, 2019) (the defendant had ample means to communicate her anger towards her ex-fiancé and his lover without sending the victim's private sexual images to her friends).

repeatedly claims that it fails as an "obscenity statute" (and is thus vague) because the definition of "obscene" does not list all the elements set out in *Miller v. California*.[125] A simple example shows the fallacy of this argument: a statute that makes photographs of human penises illegal, without exception, gives full notice to citizens and law enforcement despite raising countless other constitutional (and practical) problems. The failure to comply with *Miller* does not result in vagueness *per se*.

B. "Harass" is dictated by the defendant's intent.

Unlike a potentially vague requirement that the conduct "harass, annoy, alarm, abuse, torment, or embarrass another," the focus is on the actor's intent. This avoids any inherent confusion. As Judge Johnson said in *Scott* of the same intent to harm:

> Harassment is in the mind of the speaker, not the hearer. The speaker who intends to harass, annoy, alarm, abuse, torment, embarrass, or offend another has himself defined, for that purpose, both the applicable term and the word "repeatedly." They are not vague or over-broad for the speaker; they are clearly and precisely known. There is no ambiguity of intent in the mind of the speaker, and intent undergirds the offense.[126]

---

[125] App. CCA Br. at 18-24, 27-29. As with his scrutiny version of "overbreadth," appellant did not present a *Miller*-based argument for vagueness to the court of appeals or in his petition. Additionally, despite arguing for the use of *Miller* in multiple facets of his brief to this Court, appellant reurges an argument—"***MILLER* . . . HOLDS NO RELEVANCE IN THE MODERN WORLD**"—that this Court declined to review. App. CCA Br. at 36-39.

[126] *Scott*, 322 S.W.3d at 671 (Johnson, J., concurring). *See Constantino v. State*, 255 S.E.2d 710, 713 (Ga. 1979) ("The point is that the defendant telephones intending to harass and the defendant certainly knows if he is doing that."). A plurality of the Supreme Court said the same thing almost 75 years ago. *Screws v. United States*, 325 U.S. 91, 102 (1945) (plurality) ("where the (continued...)

C. That intent is qualified by an objective standard.

The "prurient interest" aspect of the *Miller* test was crafted to utilize the "average person" standard to ensure that "so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one."[127] To the extent the statute incorporates the "prurient interest" prong, it contains an objective standard.

The same applies to the "patently offensive" language of subsection (b)(3). "Offensive," on its own, might suffer from the same complaints made about "annoy" but for its qualifier. "Patently" means in a way that is clear,[128] unmistakably,[129] or in a way that is so obvious that no one could disagree.[130] It is the adverbial form of the adjective "patent," which means readily visible or intelligible,[131] obvious,[132] or

---

[126](...continued)
punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law.").

[127] *Miller*, 413 U.S. at 33.

[128] https://dictionary.cambridge.org/us/dictionary/english/patently

[129] https://www.vocabulary.com/dictionary/patently

[130] https://www.macmillandictionary.com/us/dictionary/american/patently

[131] https://www.merriam-webster.com/dictionary/patent

[132] https://dictionary.cambridge.org/us/dictionary/english/patent

extremely obvious.[133] If something is clearly, unmistakably, and obviously offensive to everyone, it should be offensive to the ordinary person. "Patently offensive" thus embraces an objective, "reasonable person," standard.

Or it should. The Supreme Court said that both "patently offensive" and the "community standard" aspect of "prurient interest" are "essentially questions of fact" lay jurors have historically decided.[134] However, in *Long*, this Court held that even the phrase "conduct . . . that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person" did not contain a "reasonable person" standard.[135] The explanation was thorough, but the rationale was undercut—if not erased—by this Court's decision earlier this year in *State v. Ross*.

In *Ross*, this Court reviewed the vagueness of the phrase "intentionally or knowingly . . . display[ing] a firearm or other deadly weapon in a public place in a manner calculated to alarm."[136] After recognizing that "calculated" is ambiguous—it could be reasonably interpreted to mean "intended to" or "likely"—the Court decided that it "is best understood to mean 'likely,' according to an objective standard of

---

[133] https://www.macmillandictionary.com/us/dictionary/american/patent_3

[134] *Miller*, 413 U.S. at 30.

[135] *Long*, 931 S.W.2d at 289-90.

[136] 573 S.W.3d at 819, 821. *See* TEX. PENAL CODE § 42.01(a)(8) (disorderly conduct for displaying a firearm).

reasonableness and from the perspective of an ordinary, reasonable observer."[137]

One of the reasons was policy. "[C]onstruing 'calculated' to refer to objective probability rather than subjective intent would put the statute on surer constitutional footing from a vagueness perspective"[138] because it "tends to invoke the reasonable-person standard."[139] Linking the two "greatly reduces [the statute's] susceptibility to a vagueness challenge—because compliance with the statute would not turn upon the unknowable, idiosyncratic sensibilities of whoever may be present."[140] And, by "adopt[ing] a decidedly unitary standard—that of the ordinary, reasonable person"—the statute is not open to "arbitrary and discriminatory enforcement."[141]

*Ross* thus gives this Court a choice when construing this statute. It also provides a solid policy reason to construe it according to the Supreme Court's intent to permit obscenity regulation by incorporating objective standards. Thus construed, the statute effectively creates an "and is reasonably likely to harass" qualifier on the intent to harass like that in telephone harassment under subsection (a)(4), which

---

[137] *Id*. at 822.

[138] *Id*. at 823.

[139] *Id*.

[140] *Id*. at 823-24.

[141] *Id*. at 826.

requires that the "average person" be harassed.[142]

D. "Another" means another person.

A natural reading of the statute suggests that "another" is the person the actor intends to harass and with whom the actor initiates communication. But what if it is not? What if someone overhears an actor intentionally harassing his intended victim with patently offensive solicitations of an ultimate sex act and then calls the police even though the intended recipient does not? It does not matter. A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired is that a different person or property was injured, harmed, or otherwise affected.[143] Regardless of who calls the police, the actor achieved what he intended and is criminally responsible. Transferred intent need not be set out in an indictment to provide notice of its applicability.[144] The statute should not be deemed vague for the same "lack of notice."

E. "Ultimate sex act" is clear even without helpful examples.

Ironically, the language in this portion of the statute is taken from *Miller*, which by appellant's measure should make it clear. Regardless, ordinary people can

---

142 *Scott*, 322 S.W.3d at 669.

143 TEX. PENAL CODE § 6.04(b)(2).

144 *Dowden v. State*, 758 S.W.2d 264, 274 (Tex. Crim. App. 1988).

understand what the term (and its examples) mean. Appellant suggests the term is vague because "this Court has sometimes struggled with the definitions."[145] The two cases he cites—the only two times this Court has had to address the term since it was added in 1983[146]—show no struggle whatsoever.

In *Pettijohn*, this Court reviewed the sufficiency of the evidence that a letter alleging someone "has been seen making sexual advances to little boys and molesting little children" described an "ultimate sex act."[147] The letter was the only relevant evidence.[148] This Court had no problem concluding, in a short opinion, that it was not enough. Finding insight in the "exemplary list of 'ultimate sex acts'" now found in (b)(3), the Court noted their "very specific nature, describing particular sexual activities."[149] The court ordered Pettijohn's acquittal because "[n]either of these two phrases [in the letter] describes a particular sexual act."[150]

---

[145] App. CCA Br. at 22 (citing *Lefevers v. State*, 20 S.W.3d 707, 712 (Tex. Crim. App. 2000), and *Pettijohn v. State*, 782 S.W.2d 866, 868-69 (Tex. Crim. App. 1989)).

[146] Acts 1983, 68th Leg. R.S., p. 2204, ch. 411, § 1, eff. Sept. 1, 1983.

[147] *Pettijohn*, 782 S.W.2d at 867.

[148] *Id*. at 868.

[149] *Id*.

[150] *Id*.

In *Lefevers*, all nine members of the Court held that the phrase "I want to feel your breasts" does not describe an ultimate sex act.[151] The analysis was almost as brief as that in *Pettijohn*: the Court took note of the "non-exclusive list"; employed *ejusdem generis*, a rule of statutory construction; and concluded that "I want to feel your breasts" refers to an action that is not like the listed examples.[152]

The few courts that have addressed the meaning of this term, in any sort of analysis, have come to the conclusions one would expect.[153] There does not appear to be any confusion.

## VI. Conclusion

Appellant did exactly what Section 42.07(a)(1) told him not to. He does not deny it. Instead, he points to other people in often-fanciful hypotheticals who may or may not be unfairly impacted. This Court, like the Supreme Court, should reject this attempt to resurrect a hybrid doctrine of "overvagueness."

---

[151] *Lefevers*, 20 S.W.3d at 708. The opinion was joined by eight judges; Judge Keasler concurred with a comment.

[152] *Id*. at 711-12. The Court interpreted "ultimate sex act" to include excretory functions, *id*. at 712, but this grammatical error does not diminish the clarity of the opinion.

[153] *See Jasper v. State*, No. 01-13-00799-CR, 2014 WL 265699, at *2 (Tex. App.—Houston [1st Dist.] Jan. 23, 2014, no pet.) (not designated for publication) (telling Crystal that Crystal's estranged husband "didn't like fucking [Crystal]. He liked fucking [appellant] better[,]" was obscene); *Rendon v. State*, No. 03-07-00616-CR, 2008 WL 4682434, at *1 (Tex. App.—Austin Oct. 24, 2008, no pet.) (not designated for publication) ("comment to the complainant that she 'would only charge fifty cents for a fuck' contained a patently offensive description of an ultimate sex act"); *Bryant v. State*, No. 05-91-00946-CR, 1992 WL 355555, at *1, 3 (Tex. App.—Dallas Dec. 4, 1992, no pet.) (not designated for publication) ("talk to me while I finish jacking off" was obscene).

## PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

## CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 10,582 words.

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of November, 2019, the State's Brief on the Merits has been eFiled and electronically served on the following:

David L. Reuthinger, Jr.
Webb County Assistant District Attorney
1110 Victoria St., Ste. 401
Laredo, Texas 78040
dreuthinger@webbcountytx.gov

Oscar O. Pena
1720 Matamoros St.
Laredo, Texas 78040
oscar@oscarpenalaw.com

Lane A. Haygood
522 N. Grant Ave.
Odessa, Texas 79761
lane@haygoodlawfirm.com

Mark Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
mb@ivi3.com

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney